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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE

UNITED STATES OF AMERICA, . Criminal No. 13-cr-00607-JFB-AYS-1
.
Vs. .
100 Federal Plaza
PHILLIP A. KENNER, . Central Islip, NY 11722
TOMMY C. CONSTANTINE, .
DATE: June 10, 2020

TRANSCRIPT OF STATUS CONFERENCE
BEFORE HONORABLE JOSEPH F. BIANCO
UNITED STATES VISITING JUDGE

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1 THE COURT: Calling the case of US/Kenner and
2 Constantine, 13-607. Let me just make sure who we have on the
3 line. Mr. Kenner, are you on the line?

4 MR. KENNER: Yes, sir.

5 THE COURT: All right, good morning, Mr. Kenner. Mr.
6 Brissenden, you're on the line?

7 MR. BRISSENDEN: Good morning, Judge.

8 THE COURT: Good morning. Mr. Talkin, you're on the
9 line?

10 MR. TALKIN: Yes.

11 THE COURT: Mr. Talkin?

12 MR. TALKIN: Yes, good morning, Your Honor.

13 THE COURT: Good morning, Mr. Talkin. And Mr.
14 Constantine, are you on the line?

15 MR. CONSTANTINE: Yes, Your Honor, I'm here.

16 THE COURT: All right. Good morning.

17 MR. CONSTANTINE: Good morning.

18 THE COURT: And then I know we have counsel for
19 Danske Bank, Mr. Kostolampros, are you on the line?

20 MR. KOSTOLAMPROS: Yes, I am, Your Honor.

21 THE COURT: All right, good morning, and you have a
22 number of your colleagues I understand?

23 MR. KOSTOLAMPROS: Yes, I have Doreen Martin, Kelly
24 Weiner, and Xochtil Strohbehn with me as well.

25 THE COURT: All right, good morning to all of you.

1 Mr. Wolinsky, are you on the line?

2 MR. WOLINSKY: Yes, good morning, Your Honor, I am
3 and (inaudible-beeping) are listening in.

4 THE COURT: All right, thank you, good morning to all
5 of you and all of them as well. And Mr. Souther and Mr. Mulry
6 are on the line for Diamante?

7 MR. SOUTHER: Good morning, Your Honor, this is
8 Thomas Souther, yes, I'm on the line.

9 MR. MULRY: And good morning, Your Honor, this is
10 Kevin Mulry.

11 THE COURT: All right, good morning to both of you.
12 And I know I received a letter from counsel for Owen Nolan
13 regarding restitution, is counsel for Owen Nolan on the line as
14 well?

15 MS. RAMACHANDRA: Yes, Your Honor, this is Seetha
16 Ramachandra, I'm counsel for Owen Nolan.

17 THE COURT: Good morning. So, is there anyone else
18 in terms of interested parties who need to be identified? All
19 right, so my agenda for today, I have three things I wanted to
20 publish for purposes of this status conference. The first
21 issue is the sentencing and the rescheduling of both of the
22 sentencings. The second issue is the forfeiture issue, which
23 I've obviously received all the letters on as well as the
24 petition from the bank. And then the third issue is
25 restitution.

1 So, I think given that there are a number of people
2 on here, I think who are listening, because of the forfeiture
3 issue, I think I'm going to start with that. So let me just
4 ask the Government before I hear from anyone who wants to be
5 heard on the forfeiture issue, I read the various letters. And
6 I guess I want the Government to advise me as to why they
7 haven't published notice with respect to the Court's
8 preliminary forfeiture order. I didn't put a date in the
9 forfeiture order, but I assumed that that would go out quickly.

10 So can the Government explain to me, when I didn't
11 hear anything for a number of months I assumed that that was
12 because there were settlement discussions going on between you
13 and the bank. But I don't understand why that notice has not
14 gone out.

15 MS. O'CONNOR: Yes, Your Honor, this is AUSA,
16 Madeline O'Connor, good morning.

17 THE COURT: Good morning.

18 MS. O'CONNOR: By way of background, the Government
19 and counsel for Danske and (inaudible-background talking) have
20 been engaging in settlement discussions prior to entry of the
21 preliminary order of forfeiture. During the course of
22 (inaudible) --

23 THE COURT: Hold on, hold on one second, Ms.
24 O'Connor, because anyone who is on the line who is not speaking
25 please your phone on mute, because I can't hear Ms. O'Connor

1 because somebody doesn't have their phone on mute. So everyone
2 put their phone on mute. Thank you. All right, go ahead, Ms.
3 O'Connor.

4 MS. O'CONNOR: During the course of those
5 discussions, the Government informally requested from Danske
6 (inaudible) the settlement was being discussed, would have
7 obviated (inaudible) ancillary proceeding. And reaching a
8 settlement that would avoid an ancillary proceeding as to the
9 resorts would be the best case scenario. And that's why the
10 Government didn't begin the ancillary proceeding and noticing.

11 Now if that settlement prospect no longer exists, the
12 Government is prepared to commence an ancillary proceeding and
13 begin the noticing process. Although we would still like to
14 engage in settlement discussions, if we can resolve Danske's
15 claim and the discovery as to Danske's claim, so that's why we
16 have waited to this point, although we're prepared to move
17 forward with noticing (inaudible) if it doesn't seem that a
18 settlement can be reached at this stage.

19 THE COURT: Well I don't understand why you can't at
20 least at this point, Danske, it's fine if there were settlement
21 discussions going on, and everybody was in agreement that was
22 in the best interest to hold off the ancillary proceeding while
23 that was occurring, but obviously Danske, by virtue of their
24 letter to me, wants to proceed with their petition, and if
25 that's their view, and I don't see why to the extent there are

1 continuing discussions, why those things can't proceed
2 simultaneously so that if a settlement is not reached, that the
3 Court is in a position to move forward with respect to their
4 petition.

5 I think I made very clear that I was of the view,
6 given all the issues that have been raised by Mr. Wolinsky and
7 by the bank, that we were going to proceed expeditiously with
8 respect to the ancillary proceeding in order to avoid any harm,
9 economic harm to third parties. So that continues to be my
10 intention. The bank wants to proceed and that's what's going
11 to happen.

12 I encourage the settlement discussions obviously to
13 proceed simultaneously. Because we all agree that it's in the
14 best interest for this to get resolved quickly. But we're not
15 going to be in a position where if those settlement discussions
16 get stalled for any reason, that then months are going to have
17 to go by because we're not in a position to move forward on the
18 ancillary proceeding.

19 But let me just confirm that that's what the bank
20 wishes to do at this point. Mr. Kostolampros, have I accurately
21 stated what your view is in terms of the timing?

22 MR. KOSTOLAMPROS: Yes, Your Honor, you have. I'll
23 just add, look, we did enter into settlement discussions with
24 the Government. We have just wasted valuable time by doing so
25 frankly. Because we provided the Government documents, each

1 time the Government requests more additional information.

2 There is valuable time wasted in between. And frankly you
3 know, look, we're open to having settlement discussions, but we
4 need to move forward with our petition.

5 THE COURT: What's the status of the resort right now
6 in light of the pandemic? Is it still completely closed?

7 MR. KOSTOLAMPROS: Yes, Your Honor, it's effectively
8 closed. There's effectively no revenues, and there's complete
9 uncertainty on when that will be lifted. And ultimately even
10 if it is lifted, what the resort will look like. And what
11 potential revenue sources there will be at that point in time.

12 THE COURT: And you mentioned in one of your letters,
13 I don't have it in front of me right now, but that there was
14 going to be need for the additional infusion of capital, I
15 guess in late July. I just want to understand if there's some
16 timing issue with respect to that. Is that --

17 MR. KOSTOLAMPROS: Your Honor, we're still,
18 everything is fluid at this point. There have been, as you can
19 imagine, there's been sort of cutting and budgeting processes
20 going forward. But you know, we expect that at least for right
21 now, that the resort probably can continue on until late summer
22 or at some point in the summer, as is right now. But again
23 there's complete uncertainty. And we expect, to the extent
24 anything changes on that, we'll be, letting the Court know
25 about the financial conditions.

1 THE COURT: All right. Is there anything else you
2 want to add before I turn to Mr. Souther?

3 MR. KOSTOLAMPROS: No.

4 THE COURT: All right, Mr. Souther, is there anything
5 you want to add?

6 MR. SOUTHER: No, Your Honor, just to echo what Mr.
7 Kostolampros has said. You know, at this point the project has
8 had to furlough nearly all of its employees in this period of
9 shutdown. The Government of Mexico has not announced when it
10 is that they're going to allow resorts, such as Diamante to
11 reopen.

12 So we've scaled back their expenses to the bone. But
13 you know, at this point they've exhausted their liquidity
14 lines. And so it's critical that we move forward as quickly as
15 possible.

16 And you know, it's been unfortunate that the
17 Government continues to say well, let's -- everything is
18 premature. We've been saying this for years. And we were
19 trying to avoid this sort of precarious situation that we're in
20 right now. So I think it's, we would encourage the Court to
21 move forward expeditiously, as you've indicated, your desire,
22 and get this resolved.

23 I mean it's almost, borders on disingenuous frankly
24 for the Government to take the position that they're
25 questioning the bank's claim. The bank has you know, put \$200

1 million into this project, and that ought to be resolved. And
2 once that's resolved, I think the bank will be in a position to
3 make other decisions.

4 But to ask the bank to put additional monies in
5 without some sort of confirmation that their claim is being
6 recognized, I think is, you know, puts them in an impossible
7 position.

8 THE COURT: All right. Mr. Wolinsky, is there
9 anything you want to add?

10 MR. WOLINSKY: Your Honor, frankly, no. Everything
11 that's been said.

12 THE COURT: All right, okay, I think everybody
13 understands what my view has been of this all along. As I said,
14 my goal was to do this very expeditiously, it was not -- my
15 goal was to be immediate settlement upon entry of the
16 preliminary forfeiture, that was the goal, and delaying that
17 for a long period of time in order to allow the Government to
18 get the value of the property and to have those discussions and
19 document exchanges take place before the preliminary order was
20 even entered.

21 But certainly, once it was entered, it was my
22 intention if there was not going to be a settlement, to move
23 forward expeditiously on the ancillary proceeding. And so
24 that's exactly what we're going to do.

25 So my belief is under Rule 32.2, I'm going to set

1 dates. I did not put dates in the preliminary order with
2 regard to noticing potential claimants and then doing the
3 publication.

4 So I think what I'm going to do here, the Government
5 can tell me if this, if there's any issues with this. I can't
6 imagine there would be. I'm going to ask the Government within
7 a week of today to provide notice to those potential claimants
8 who they are reasonable aware may have an interest, including
9 obviously the bank. Obviously understand that the publication
10 takes longer and it would be the Court's goal to make sure, to
11 the extent possible, that I'm considering all of the potential
12 claims simultaneously. Because I do agree with the Government
13 that that's obviously beneficial and important.

14 But I don't think the bank should have to wait in
15 order to see, at least in briefing their motion, for the
16 publication to be complete. So is there any issue with the
17 Government providing notice to the bank and any other potential
18 claimants that the Government is aware of, of within a week
19 today?

20 MS. O'CONNOR: No, Your Honor, we'll begin the
21 process and we would just ask that the resort cooperate in
22 providing information as to potential claimants, if we don't in
23 fact have any of that information on hand.

24 THE COURT: I'm sure, Mr. Souther, you'll do that?

25 MR. SOUTHER: Of course, Your Honor .

1 THE COURT: All right. And then in terms of the, a
2 date for the publication. How long does it take for the
3 Government to arrange for the publication?

4 MS. O'CONNOR: We could do that within the same time
5 period, Your Honor.

6 THE COURT: All right, so a week from today, the
7 notices will go out. And the publication will take place. And
8 then obviously at that point Mr. Kostolampros, your petition
9 will be something the Court can address. You don't have to
10 file it again, it's obviously already on the docket. At that
11 point it will be ripe.

12 My question to you is, the Government obviously in
13 their papers has indicated, notwithstanding what you and Mr.
14 Souther have said about the nature of the claim and the
15 documents that have already been provided over a long period of
16 time, the Government they are saying that they're still missing
17 some documents. I'm going to give you the choice of how you
18 want to proceed. We could set a date for the Government to
19 provide you a list of what additional documents they think they
20 need. And for then you to provide those or respond why you
21 don't think they should get those. Or an alternative would be,
22 for you to file -- well I guess it could be simultaneous to
23 that, you could file your motion and I wouldn't make the
24 Government respond until the discovery issue was resolved,
25 because obviously their position is going to be, we can't

1 respond to this until we have all the necessary documents. But
2 again, my goal is to let as little time go, you know, be wasted
3 as possible. So if you want to do those things simultaneously,
4 you want to do the discovery issue first before you file your
5 motion. Have you thought about that?

6 MR. KOSTOLAMPROS: Yes, we have, Your Honor. I mean,
7 look, we feel that we've given the Government everything that
8 they need. We've given them our bank statements, we've given
9 them the underlying agreements. We've given them recently
10 every wire transfer for the \$90 million of transfers that they
11 highlighted in their, one of their letters to the Court. We've
12 addressed and given them documents on the 14.8 million and
13 internal transfers.

14 So we feel that we've given the Government
15 everything. So again, we would like to proceed on a dual
16 track. Get our motion filed and, you know, we'll take their
17 request and we'll, you know, to the extent they're relevant
18 requests, and we feel like they're, that there's no challenge
19 to be made to those requests, we'll provide those documents to
20 them.

21 And I would ask that, you know, they should be able
22 to get us those document requests, you know, within days, if
23 not at most a week.

24 THE COURT: Yes, I was thinking a week as well, a
25 week. Just, you know, give you a list of whatever remaining

1 documents or information they would need a week from today.

2 But then, is the Government able to do that?

3 MS. O'CONNOR: Yes, Your Honor.

4 THE COURT: All right, and then when do you want to
5 file your motion by, when do you want to respond to that letter
6 by, Mr. Kostolampros?

7 MR. KOSTOLAMPROS: We could file our motion for
8 summary judgment within a week, Your Honor.

9 THE COURT: You have to wait for them --

10 MR. KOSTOLAMPROS: All right, I'll wait for them for
11 their document request.

12 THE COURT: No, not -- just wait for them to file the
13 notice, they're going to do that within a week from today, so
14 let me just say, today is the 10th, so you want to file it next
15 Friday, the 19th?

16 MR. KOSTOLAMPROS: Sure.

17 THE COURT: All right.

18 MS. O'CONNOR: Your Honor.

19 THE COURT: Yes, go ahead, Ms. O'Connor.

20 MS. O'CONNOR: We just wanted to point out that the
21 noticing, the publication period is 60 days for a claimant to
22 file a claim. And if the Court wants to determine all claims
23 and make sure there are no competing claims, it would make
24 sense for the publication noticing period to conclude, and all
25 claims to come in, and make sure there are no competing claims,

1 before addressing for my (inaudible-beeping) motion.

2 THE COURT: I know, but even I agree with you on
3 that, which I said I do think it's possible that obviously
4 should be done, but even if I were to wait, why should I not
5 have the motion completely briefed so that when that 60 day
6 period expires, assuming say there's no other claimants, then
7 I'd be immediately in a position to decide the bank's motion, I
8 wouldn't have to wait a day longer. I could issue my ruling on
9 the 61st day. That's my goal.

10 MS. O'CONNOR: Yes, Your Honor, we would also point
11 out the Government's entitled to depositions of parties, which
12 might not -- although we have an idea of certain individuals
13 we'd like to depose, the identity of those individuals might
14 not become apparent to us until we receive the remaining
15 documents we need from the bank.

16 THE COURT: Well, again I'll take it step by step.
17 I'm finding it hard to believe there's going to be depositions
18 necessary in this case. But I could be wrong. But obviously
19 I'll let you be heard on whatever remaining discovery you think
20 prior to you filing your opposition. But this is going to be
21 driven by the bank's ability to respond to your various
22 requests, not the Government's you know, need for more time.

23 So, Mr. Kostolampros, if you get the request for
24 documents, to the extent the Government believes in advance of
25 getting additional documents, that they need a deposition, you

1 should put in that letter next week. I understand obviously
2 they may not know that fully until you get all of the documents
3 you believe you're entitled to, but if you already know you
4 want the deposition of somebody, it should be in that letter
5 next week.

6 So Mr. Kostolampros, if they give you that letter
7 regarding their discovery requests a week from today, how long
8 do you want to respond, either provide the documents I guess or
9 explain to me why you're opposed to it.

10 MR. KOSTOLAMPROS: Right, we'll do so, Your Honor.

11 THE COURT: Do you want to set a date for that, or do
12 you want to not do that at this point, because you don't know
13 what's in the letter. If you want you can see the letter and
14 then you know, after you get the letter, propose to me a date
15 by which you'll provide the documents and respond, and/or let
16 me know your objections. Do you want to handle it that way,
17 since I guess you don't know what they're going to say.

18 MR. KOSTOLAMPROS: Yeah, I think that makes sense,
19 Your Honor.

20 THE COURT: All right, so you're going to get a week,
21 at the latest a week from today. You want to the following
22 Monday to put in your response. I anticipate the letter would
23 say, we're willing to provide these documents by X date, but if
24 there's some portion of their request that you believe they're
25 not entitled to then you would let me know in that letter, and

1 you know, if you need more time to brief that, I'd give you
2 more time. But does that sound good?

3 MR. KOSTOLAMPROS: Yes, yes.

4 THE COURT: So I don't have a calendar in front of
5 me, the Monday --

6 MR. KOSTOLAMPROS: Monday is June 22nd.

7 THE COURT: Right. All right, so June 22nd. At this
8 point I'm not going to -- let me think about this for a second.
9 At this point what I'm going to do is I'm going to set the
10 Government's opposition not the motion 45 days from the date
11 it's submitted. And then two weeks for the reply. And what
12 that will essentially do is -- and obviously that's subject to
13 change, if the Government doesn't get documents that I
14 determine that they're entitled to prior to filing their
15 opposition, I'll obviously adjust that. But assuming whatever
16 the Government needs is provided, and I rule with respect to
17 the remaining documents, this will be the date, there will be
18 no extensions. And then that, with this briefing period, what
19 we'll do, we'll give basically 60 days out it will be fully
20 briefed. And then I'll see if there are other claimants who
21 respond to the publication.

22 All right, any questions from the Government on the
23 schedule?

24 MS. O'CONNOR: Your Honor, we just wanted to clarify
25 the date, so Monday June 22nd is when the bank will file its

1 motion?

2 THE COURT: No, they're filing their motion Friday
3 the 19th. So your opposition is due 45 days from June 19th.
4 If it lands on a weekend, it's due the following Monday. And
5 then the bank will have two weeks from that date to put in any
6 reply.

7 All right, and I would obviously, so before I get to
8 the next point, does the Government have any questions about
9 the schedule?

10 MS. O'CONNOR: No, Your Honor.

11 THE COURT: All right. Any questions from the bank?

12 MR. KOSTOLAMPROS: No, Your Honor.

13 THE COURT: All right, and again, I will, I think
14 this is obvious, but I would encourage you, as the bank
15 indicated, to continue trying to resolve it. I think it's in
16 everybody's interest to get that done before this 60 day period
17 ends. So anything that the Court can do, you know, even though
18 we're not physically open, if you think, I think it was Judge
19 Shields, right, wasn't Judge Shields involved at some point?

20 MR. KOSTOLAMPROS: Yes, Your Honor.

21 THE COURT: If you think having Judge Shields try to
22 mediate some of those discussions, I'm sure she can make
23 herself available by phone to do that. So, but any issues, I
24 don't want to -- any issues that come up at any point, write me
25 a letter immediately so that we can address them during this

1 period, I don't want there to be any unnecessary delay. I'm
2 reading every letter that comes in.

3 All right, but before we leave the forfeiture docket,
4 let me just ask the defendant's, Mr. Talkin, do you have
5 anything you want to add on the forfeiture issue at this point?

6 MR. TALKIN: No, Your Honor, just as we said before,
7 we just want to move as fast as possible so the victims have
8 the best chance of getting back any of their money.

9 THE COURT: All right, I agree. Mr. Kenner, is there
10 anything you want to add on the forfeiture issue?

11 MR. KENNER: No, Your Honor.

12 THE COURT: All right. So obviously anyone who was
13 listening for purposes of the forfeiture, can drop off the call
14 if they want. Feel free to continue to listen if you'd like,
15 but we're going to move on to the other agenda items.

16 So I do want to talk about the sentencing and
17 proceeding with the sentencing. And Mr. Kenner, I obviously, I
18 know through Mr. Brissenden, I think you wrote me a letter,
19 initially objecting to the continued adjournments of the
20 sentencing. I just wanted to discuss that with you. And I
21 certainly understand your frustration. Because I know you'd
22 like to continue on, including an appeal.

23 But first of all, I did want to proceed on March
24 18th, and I was doing everything I could to try to keep that
25 date. But I just determined at that point it wasn't safe to

1 bring, have the Marshals bring you out. It was right on the
2 edge before everything shutdown completely. But you know,
3 having the victims, having you, having the lawyers, having
4 everybody in the courtroom at that point, I already made the
5 determination that it was not safe to do.

6 So unfortunately I did have to cancel it at the last
7 minute. But in terms of what the options are at this point,
8 and let me just, because I get to Mr. Kenner. Mr. Talkin, my
9 understanding, just based upon your letters, is that your
10 client wishes to put off his sentencing until he can safely
11 physically appear in the court for his sentencing, is that
12 understanding correct?

13 MR. TALKIN: That's right. Him as well as numerous
14 supporters that he has.

15 THE COURT: Right. All right. So, does the
16 Government want to be heard with respect to Mr. Constantine
17 before I go back to Mr. Kenner? Does the Government agree
18 with that?

19 MS. KOMATIREDDY: Yes, Your Honor, AUSA Komatiredy.

20 THE COURT: So Mr. Kenner, what the situation is, and
21 I don't know how much, Mr. Brissenden you have researched this,
22 but under the Cares Act, the Court is permitted, because of the
23 situation currently, to conduct a video sentencing with your
24 consent, if I determined that the sentencing cannot be further
25 delayed without serious harm to the interests of justice.

1 So my view is, and I've sentenced hundreds of people
2 over 14 years, I've never sentenced someone by video. It's my
3 view, and normally the law wouldn't even allow for something
4 like that. It's my view, I think for obvious reasons, having
5 everybody physically in the courtroom, seeing you when you're
6 speaking, seeing the victims when they're speaking, the
7 lawyers, is important, very important.

8 So, I view sentencing someone by video, and honestly
9 it's reflected in the law, as a last resort, where there's
10 going to be some serious harm to the interest of justice if
11 it's not done expeditiously.

12 I don't believe that that standard has been met under
13 these circumstances currently. And obviously I'm making these
14 decisions not knowing how long the current situation is going
15 to continue. Each time I've adjourned this for 30 days or so.
16 My hope was that at some point the situation would be safe
17 enough for the Marshals to be able to produce you to the
18 courtroom, and I was thinking about using the ceremonial
19 courtroom to have maximum space. That courtroom is gigantic.
20 And I think to have everybody in there safely.

21 So that's been my thought process, is that we're
22 potentially getting closer to that point. I don't, I was going
23 to ask the Government if they have any more information than I
24 do. I don't have, I have not received information from the
25 court or the Marshal Service, as to a date by which they think

1 they're going to be in a position to do that. But let me just
2 ask the Government before we proceed further, whether they have
3 any more information on that.

4 Is the Government aware of any estimate of when the
5 Marshals might be in a position to do that?

6 MS. KOMATIREDDY: Your Honor, this is AUSA
7 Komatireddy, we are not aware of any particular date. I
8 understand that there are preparations being made, and I'm sure
9 Your Honor is aware of the same, to modify the courthouses in
10 order to get to that point. But we are not aware of a specific
11 date.

12 THE COURT: All right. So, you know, and Mr. Kenner,
13 I'm prepared to hear from you, and I'm just going to invite
14 you, if you want put something in writing, you can do that as
15 well, to explain to me why you believe that the standard is met
16 unless you proceed by video. But you know, my hope is that
17 we're going to have more information, as things begin to open
18 up in the very near future.

19 Actually, let me ask the Government, I'm not aware,
20 has there been any in person, forget about a sentencing, but
21 have there been any in person proceedings, arraignment or
22 anything like that? I'm not aware of any. Have there been any
23 that you're aware of?

24 MS. KOMATIREDDY: I'm not aware of any since the
25 lockdown order that was issued by the Governor in late March.

1 THE COURT: Okay. All right. So Mr. Kenner, if you
2 want to put in a letter explaining to me why the standard has
3 been met and I should proceed with a video sentencing, you
4 know, over the next, sometime maybe 30 days out. I'm open
5 minded about looking at it. But I want you to understand what
6 my thinking is. So I don't know if you've given that some
7 thought.

8 MR. KENNER: All right, thank you, Your Honor.

9 THE COURT: So what do you want to do, do you want to
10 think about it, or do you know what your view is now, Mr.
11 Kenner. Do you want to put something in writing, just tell me
12 what you'd like to do with respect to that, got another date
13 right now, and we'll take it from there.

14 MR. KENNER: Your Honor, I would prefer an in person
15 appearance. So I don't think you need to wait for a letter
16 from me to describe any circumstances you're not aware of. I'm
17 in concurrence with what you previously said, so.

18 THE COURT: So my intention would be to do what I've
19 been doing then. Which is we'll find, we'll pick a date
20 possibly 30 days out for an in person sentencing. And you
21 know, just because you're of that view right now, Mr. Kenner,
22 and of the same mindset, if for whatever reason you know, there
23 was a spike in cases again and it appeared that this was going
24 to be a much longer term. I'm constantly reassessing the
25 situation and what my views are. And I'll obviously consult

1 with you on that.

2 But my hope is at this point, given the trend, that
3 we're getting very close to be able, trials are an entirely
4 different ball game in terms of the complexity of being able to
5 do something like that. But I would think the first, the one
6 that's least complicated is to have one defendant being
7 sentenced.

8 So, that's my plan is to set -- and I would just say
9 to Mr. Constantine and Mr. Talkin, if, my hope is, as you have
10 seen, is to have the sentencings of both defendants on the same
11 day. And that would allow obviously, to the extent the victims
12 wanted to be in person, that they would only have to be in
13 court on one occasion. But I'm also open to considering the
14 fact, if Mr. Kenner, if the Marshals are able to produce Mr.
15 Kenner and he wants to proceed expeditiously, but there's some
16 issues about Mr. Constantine and/or his supporters getting
17 there, I would be open to having some period of time, not too
18 long, but some period of time before we proceed with Mr.
19 Constantine.

20 You know, the victims, can also, even if we're
21 physically in the courtroom, the victims if they wanted to
22 could appear by, I assume we could hopefully set it up
23 logistically to appear by video, while we were physically in
24 the courtroom. So the extent that they went to Mr. Kenner's but
25 didn't want to come back again for Mr. Constantine, we could

1 arrange some video hopefully, or at least audio.

2 But is that understood?

3 MR. TALKIN: Yes, unless we say something to the
4 contrary by letter, we're in full agreement that we're on the
5 same date and we'll wait until that's available.

6 THE COURT: All right. So, Jim, do you want to pick
7 a date, maybe some time after July 13th for potential in person
8 sentencing.

9 THE CLERK: Yes (inaudible)

10 MR. BRISSENDEN: Judge, I know --

11 THE COURT: Go ahead.

12 MR. BRISSENDEN: Judge, this is Matt Brissenden,
13 unfortunately, and I'm only standby counsel, but I'm not
14 available on that date.

15 THE COURT: All right --

16 MR. BRISSENDEN: Or any day the following week.

17 THE COURT: Yeah, the following Wednesday, let's do
18 it on a Wednesday, Jim, Wednesday. What is that the 23rd?

19 ATTORNEY: Your Honor, that's the only day of the
20 week I'm really to available.

21 THE COURT: All right, how about Tuesday the 22nd?

22 ATTORNEY: Wednesday would be the 22nd.

23 THE COURT: So Tuesday the 21st?

24 ATTORNEY: I'm free all day.

25 THE COURT: All right, so, why don't we say Mr.

1 Kenner at 10:30 and Mr. Constantine immediately thereafter,
2 we'll say 11:30, but you know, whenever Mr. Kenner is over. Is
3 that okay with the Government?

4 MS. KOMATIREDDY: This is AUSA Komatireddy, yes, Your
5 Honor. We have consulted with the victims as well, and they
6 are available at that time. Several of them plan to be there in
7 person.

8 THE COURT: All right. And you can again, invite them
9 to, if they want to -- we'll have to look into the video, but
10 certainly we know we could get them by audio if they didn't
11 want to come in person. All right.

12 (Court and clerk confer)

13 THE COURT: All right. So, the only, before I'll see
14 if you have any other issues, but the last issue is the
15 restitution issue. I did receive the letter from Owen Nolan's
16 counsel which I wanted to discuss and then just discuss the
17 restitution issue more generally.

18 So the Government, that was only submitted a day or
19 so ago, and the Government had a chance to review that, and if
20 you want to respond in writing, I guess I'll give you a chance
21 to do that, or you can tell me now what the Government's view
22 is with respect to that.

23 MS. KOMATIREDDY: Your Honor, this is AUSA
24 Komatireddy. I would ask that we'd be able to respond in
25 writing.

1 THE COURT: Okay, that's fine. And I just note, I
2 know the Government, obviously we've been talking about
3 restitution for a while. The Government did, I think back in
4 December, have a revised chart which I think prompted in part
5 the letter from Ms. Ramachandra. But in that letter the
6 Government also said in addition to Owen Nolan, I believe that
7 there, the Government believed that there were going to be
8 other supplemental submissions on restitution from Mr. Hughes
9 and Mr. Rezi (phonetic). I don't think I've ever seen those
10 and I don't know if the Government is aware of whether or not
11 they did also file any type of supplemental affidavit with
12 regard to what they believe they're entitled to.

13 MS. KOMATIREDDY: We did send, Your Honor, AUSA
14 Komatireddy, we did send a loss affidavit form to those
15 individuals. I will need to run down whether they returned
16 yet.

17 THE COURT: All right, and if they haven't, I would
18 just, to the extent you have contact information, just contact
19 them and let them know that they should do that expeditiously
20 if they want the Court to consider it. So, Ms. Ramachandra, I
21 don't know if there's anything you want to add at this point,
22 until you see the Government's response.

23 MS. RAMACHANDRAN: Yes, I'll wait until I see the
24 Government's response.

25 THE COURT: I would just say, I was thinking, I was

1 looking at your submission, I would just say, although I think
2 you accurately cited the law as it relates to what could be the
3 subject of restitution, in terms of when there's a scheme. The
4 issue, I believe think there's a couple of issues with what you
5 submitted.

6 One of the issues that jumped out at me is that even
7 if it could be considered part of the count of conviction, it
8 still would require the Government to have proven that that as
9 part of the scheme, and I don't know how much you looked back
10 at the trial transcript and you know, the post trial, the
11 forfeiture hearing and things of that nature. But and I don't
12 know exactly all the different that are in that or not you're
13 seeking.

14 But if Mr. Nolan had other investments, Mr. Kenner,
15 that he believes were part of the scheme and were fraudulent in
16 some manner, but the Government hasn't, has not proven it, as
17 part of the trial or the post trial proceedings, then that
18 would be problematic, even if it could be considered part of
19 the count of conviction.

20 And the other thing I noticed is, I think some of
21 what he was seeking as restitution I thought, looked like it
22 was part of the penalty, some type of penalty with respect to
23 the arbitration. I don't know why that would be something that
24 the Court could also include in a restitution order.

25 So those are two issues that just jumped out at me.

1 But it may make sense to wait for the Government to respond and
2 then you can put in another letter. And then if necessary we
3 can have another call to discuss it. Okay?

4 MS. RAMACHANDRAN: Okay. I mean one of the challenges
5 in writing this letter was in the Government's submission it
6 really wasn't clear how they arrived at the number for Mr.
7 Nolan for the restitution number. I mean I take their
8 submission at their word where they say they're only including
9 amounts that were, you know, part of the scheme charged in the
10 indictment, and proven at trial. But it wasn't clear what those
11 were without looking back at the trial transcripts, which I
12 don't have access to.

13 THE COURT: All right, well you can, I'll ask them in
14 your letter to break down how they arrived at that particular
15 number so you can see what the breakdown is. And honestly you
16 can call them and maybe have a discussion with them about that
17 if you want as well. They obviously have an obligation to work
18 the victims and victims' counsel to try to make sure the
19 amounts are accurate.

20 But I can just tell you generally that you know, in
21 terms of the line of credit money that went, that was part of
22 the Hawaii project before the global settlement fund, those
23 were the parts of the scheme that were the focus of the trial.
24 So my belief is is that that's what's embedded in that number.
25 Okay?

1 MS. RAMACHANDRAN: Okay. Thank you.

2 THE COURT: All right.

3 MR. TALKIN: Your Honor, on behalf of Mr.
4 Constantine, I just want to flag one issue, which I'm not sure
5 is going to come up based on the Government's submission to
6 date. And you know, clearly unlike forfeiture, restitution is
7 joint and several. But the statute does contain language that
8 allows for proportionality based on conduct.

9 And we do have the unique situation here with the
10 lines of credit which are a large amount of money. And you
11 know, it's clear that there's a strong argument for Constantine
12 on proportionality as to those, whether he would be responsible
13 for restitution as to those monies that didn't make it to
14 Hawaii and things along those lines.

15 And certainly any of these collateral issues that are
16 being raised by the victims as far as penalties or judgments or
17 anything like that, that arise strictly from. I don't think
18 we're there yet. I just wanted Your Honor and the Government
19 to know that that's something that we should think about as we
20 go through this.

21 THE COURT: Yes, I'm glad you raised that and I don't
22 remember now if the Government, in light of my forfeiture
23 ruling ever backed out the lines of credit for purposes of
24 restitution. But it would be my view that that's not the part
25 of Mr. Constantine's restitution order for the same reasons

1 that I do not believe it should be part of his forfeiture
2 order. So to -- the Government hasn't done that to make sure
3 that there's a restitution amount that takes that into
4 consideration.

5 I would just also ask you, Mr. Talkin, I know several
6 months ago you were of the belief that the -- there might be
7 some sale of the (inaudible-audio glitch) or the patents --

8 MR. TALKIN: Yeah, I --

9 THE COURT: -- are there --

10 MR. TALKIN: Actually Your Honor, I will update you
11 and the Government shortly on that. But in short it hasn't
12 happened yet, because the (inaudible) kind of froze everything.
13 But it's still alive. I will speak to the attorneys in the
14 sale and the CEO, and I'll give everyone update, a short
15 letter, just probably on the -- so everyone knows what's going
16 on.

17 THE COURT: All right. And Ms. Ramachandra, Mr.
18 Kenner had raised at some point, and the Government I think had
19 probably reached out to you and then responded in a letter.
20 But I just want to confirm. Mr. Kenner was of the belief that
21 there had been some kind of civil settlement reached, I believe
22 with Mr. Jowdy, and was arguing that his restitution to your
23 client should be offset by whatever settlement was reached.

24 I think my memory is that the Government, in a letter
25 to me, indicated that they did not believe -- because Mr.

1 Kenner wanted a copy of the settlement agreement. So I don't
2 think I saw anything in your letter about that. But I just,
3 again I want to try to eliminate any open issues. I haven't
4 heard from Mr. Kenner yet, but I know that was something he was
5 interested in. Do you want to respond to that?

6 MS. RAMACHANDRAN: Well I sort of assumed from the
7 docket entries and so forth on the correspondence I saw that
8 the Government had not offset their restitution number by that
9 settlement agreement. So I had actually viewed that as
10 resolved. But I can respond to that as well when I respond to
11 the Government's letter.

12 THE COURT: All right. Yes. All right, Mr. Kenner,
13 is there anything you want to be heard on, on the restitution
14 issue at this point?

15 MR. KENNER: Perhaps Your Honor can just lay out what
16 your schedule is with respect to the restitution or a hearing.
17 I know you had mentioned that you thought you may do that in a
18 separate forum. And I'm just unfamiliar with what your
19 schedule and thought would be on that.

20 THE COURT: My thought, we were going to go forward
21 in March because there were open issues, I had already decided
22 that the law allows me I can sentence somebody, and then put
23 off the setting of the restitution amount so as not to delay
24 the sentencing. And that continues to be my view, is that to
25 the extent there are any open issues regarding restitution,

1 it's not doing go delay the sentencing. I'm just going to go
2 forward with the sentencing as soon as we can. And if
3 necessary, just have that restitution issue play out a little
4 bit more. So that's my current intention.

5 Your sentencing is not going to be delayed by the
6 restitution issue in other words. But I know to the extent,
7 I'm hoping that the situation at MDC is okay right now, but to
8 the extent your hope was that you know, this wouldn't delay how
9 long you would have to be at the MDC versus another institution
10 if you were sentenced. Because you are pro se, that you know,
11 I would want you to stay here for, until the restitution issue
12 was resolved, so that might delay a designation. But I'll have
13 to think about that.

14 But what's the situation at the jail right now, is it
15 okay there?

16 MR. KENNER: No, it's not. But this probably isn't
17 the right forum with everyone else on the line to talk about
18 this situation.

19 THE COURT: All right. Well, I'm sorry to hear
20 that, but if you want to send me a letter regarding whatever
21 the situation is, obviously I'll look at it. I'm monitoring,
22 obviously as you know, there's litigation going on with respect
23 to that, I'm monitoring that. But if there's anything in
24 particular you want to bring to my attention, just send me a
25 letter. But you know, I'll take that into consideration as

1 well.

2 MR. KENNER: So if Your Honor could just clear up one
3 point for me. And I can deal with the rest of this with Mr.
4 Brissenden. I'm assuming it's just going to be after
5 sentencing that you're going to wrap up whatever restitution
6 issues may be outstanding. Is there a plan for a hearing
7 similar to the forfeiture hearing, or what is the schedule that
8 we have on that or is it just --

9 THE COURT: No I don't, at this point I don't
10 anticipate any type of evidentiary hearing on that. You know,
11 obviously I have the trial evidence, I have the forfeiture
12 evidence. To the extent that there are any issues, for example
13 if there are issues with regard to for example Owen Nolan
14 believing that there were certain frauds that were part of the
15 scheme that he should get restitution on, that were part of the
16 offense of conviction, the Court would not be having a hearing
17 on something like that, that's just something at this point I
18 would not entertain.

19 So, I don't anticipate there actually being at this
20 point any type of evidentiary hearing with respect to
21 restitution. I have the ability to do that if something in an
22 affidavit, you know, comes in and disputed, it's not something
23 I heard testimony about, to do that. But I'm not at that
24 point.

25 MR. KENNER: Okay.

1 THE COURT: Okay?

2 MR. KENNER: Yes.

3 THE COURT: All right. So that's all I had on my
4 agenda, is there anything else, Mr. Kenner is there anything
5 else you want to raise with me today?

6 MR. KENNER: No, sir.

7 THE COURT: All right, if you want another status
8 conference, as we're doing today by phone, Mr. Kenner, just
9 again write me a letter, and request a phone conference to
10 discuss whatever it is. I don't want you to feel like you're
11 cutoff from the Court just because you can't appear in person.
12 All right?

13 MR. KENNER: Okay, thank you, Your Honor, I
14 appreciate that.

15 THE COURT: Right. Mr. Talkin, is there anything
16 else from your client today?

17 MR. TALKIN: No, thank you, Your Honor.

18 THE COURT: All right, does the Government have
19 anything else today?

20 MS. KOMATIREDDY: No, Your Honor, thank you.

21 THE COURT: All right, thank you everybody, I
22 appreciate your patience and take care.

23 * * * * *

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C E R T I F I C A T I O N

I, **PATRICIA POOLE**, court approved transcriber,
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
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/S/ PATRICIA POOLE

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